Supreme Court, U.S.
FILED

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No.

In The

Supreme Court Of The United States

Webster Watnik

Petitioner

vs.

Debra Kniesley

Respondent

Petition For Writ Of Certiorari To
The Court Of Appeal Of The State Of California,
Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED

This petition asks:

1. Did the California family law court violate petitioner's right of due process by virtually terminating his parental rights?

2. Did the California family law court fail to apply the binding authority of *Santosky v. Kramer* 455 U.S. 745 (1982)?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Webster Watnik, the Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and

[ ] is reported at; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Superior court appears at Appendix B to the petition and

[ ] is reported at; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

Review was denied by the California Supreme Court on November 26, 2002. A copy of that decision appears at Appendix C.

The time to file this petition is 90 days from November 26, 2002.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

Webster Watnik and Debra Kniesley were married in 1988. They had one child, Wyeth, born on July 27, 1989. They divorced in 1992.

For the first five years Webster and Debra shared the child equally, and father-and-son developed a close relationship. Family friends commented about the good relationship. Dr. Pearse Derrig said "I have seen Mr. Watnik with his son many times. During those times, Mr. Watnik has been a calm, pleasant, reasonable, and completely devoted to his son... Wyeth seems to blossom and thrive in Mr. Watnik's presence." . And Stephanie Sharf said "Wyeth seemed affectionate and relaxed towards his father... He seems uninhibited about expressing his opinion on all subjects...".

But soon Debra began making false child abuse allegations against Webster. In 1993, her first abuse allegation was investigated and deemed "unfounded". But Debra was just getting started.

In 1994, Debra filed a post judgment motion to modify custody. A temporary order was made that fall, and a one-day trial was held in 1996. Debra was granted sole legal custody and Webster was given "traditional" visitation of every other weekend, summers, and holidays, or about 34%. In addition, Debra was ordered to provide Webster a "constant flow of information" about Wyeth.

After the trial, Debra filed more motions to reduce Webster's visitation. More hearings ensued, and a new order was made in 1997, with the court finding "no change of circumstance".

Debra then returned to court on January 31, 1998, with another OSC to reduce Webster's visitation. This was only 10 months later. Debra accused Webster of not taking Wyeth to baseball games and giving him a haircut. Webster denied Debra's allegations, and then Debra suddenly reversed her

position and on March 27, 1998—only two months later—asked the court to keep the current custody order "in full force and effect".

Hearings were held throughout 1998, and a Proposed Statement of Decision was entered in January, 1999, that directed Webster to attend anger-management classes but did not change his visitation.

A month later, in February, 1999, Wyeth left Debra's house and went to Webster's house. Webster called the police. An officer interviewed Wyeth, placed him with Webster, and reported that Wyeth had run away.

However, Debra accused Webster of kidnapping Wyeth, and Webster and Debra immediately had a two-day trial. During the trial, Debra's lawyer verbally abused the court and was held in contempt. After the trial, the judge "temporarily" suspended Webster's visitation, but allowed Webster to call Wyeth daily. On May 5, 1999, a new "permanent" custody order was entered, restoring Webster's now 20% visitation. Webster was ordered to attend parenting classes, and Webster's daily phone calls with his son remained.

Debra did not appeal.

On June 17, 1999, Debra filed a new OSC. This was only 43 days later. This time, she wanted to completely terminate all of Webster's visitation with his son. She alleged that Webster was disrupting Wyeth's school, that Webster argued with her father one time at a pick-up, and that Webster didn't give Wyeth his ear medicine. Webster alleged that Debra was sabotaging his phone calls with Wyeth, all her allegations were false, and that Debra was coaching Wyeth to say he hated Webster. Webster asked for primary custody.

The court denied Debra's ex parte motion to shorten time. No change was made to the May 5, 1999, "permanent" custody order.

In the meantime, Debra and Webster argued over visitation. On July 5, 1999, the police were again

called, a second officer talked to Wyeth, and the police again placed Wyeth with Webster. On July 7, 1999, Debra retaliated by going to Webster's house and placing him under citizen's arrest. Debra's accusations against Webster were quickly rejected.

Later that month, Webster arrived to pick-up Wyeth, but Debra hid the boy. Webster called the police, and the officer ordered her to deliver Wyeth to Webster.

Finally, on August 3, 1999, the court heard Debra's June OSC. Webster again asked for primary custody, alleging that Debra was harassing him with constant faxes, she had made 17 false police reports against him—including the previous child abuse accusation that was deemed "unfounded"—and she was bombarding him with endless false allegations to sabotage his contact.

The judge refused to change the visitation order, but ordered Webster not to tape-record his son.

On August 9, 1999, Debra returned to court with another OSC to terminate Webster's visitation. This was only 6 days later. In her new OSC, Debra accused Webster of distributing flyers around her neighborhood. The judge ordered all parties to be interviewed by Family Court Services, who submitted a report on August 12, 1999.

At the August 12, 1999, hearing, Family Court Services recommended that Webster not tape-record Wyeth (apparently unaware an order was in place), and that Webster's visitation not be reduced. Wyeth told Family Court Services he wanted more time with his father, including half the summer and longer weekends. Family Court Services included the boy's requests in the recommendations. The judge, however, ignored Family Court Services and "temporarily suspended" Webster's visitation and ordered Webster to be evaluated by a different psychologist, not the court-appointed psychologist.

Having succeeded in cutting-off Webster from his

son without a trial, Debra then stalled and delayed for the next 18 months. She filed numerous failed motions, including a motion to hold Webster as a vexatious litigant, which was denied, a second motion to hold Webster as a vexatious litigant, which was again denied, a motion to hold Webster in contempt, which was denied, and two motions for sanctions, which were both denied. Debra even filed a motion to disqualify the trial judge.

On November 17, 2000, the court relieved minor's counsel for misconduct.

On December 15, 2000, the long-delayed OSC came to trial over Debra's numerous objections. However, Debra's lawyer arrived 45 minutes late and verbally abused the judge. Debra's lawyer yelled that it was a "kangaroo court". To circumvent Debra's stalling tactics, the judge interviewed Wyeth in chambers. Wyeth said his father did not hurt him, and he asked that his visitation begin with one supervised session from 8 a.m. to 8 p.m. and then increase.

In the afternoon, after more verbal abuse from Debra's lawyer, the judge declared a mistrial.

The case was assigned to another judge, and the fourth trial began on January 16, 2001. This judge also interviewed Wyeth in chambers. Wyeth said his mother involved him in the case and she told him about anger management for his father. Wyeth again asked for a full-day supervised visitation with his father, and then for the visitation to be unsupervised. And finally, Wyeth said his complaints about his father were only that his father yelled at him and involved him in the case.

Debra's witnesses were herself, Webster, her father, and a former lawyer of Webster's. Her father testified to the one-time argument at the exchange, and the lawyer testified to sending Webster two letters in 1997. Debra admitted under oath that she was not an eyewitness to any of her allegations, but that she

wanted total custody of Wyeth with no visitation for Webster.

Webster called two police officers, two family friends, the court psychologist, the court mediator, Debra, himself, and Wyeth. One officer testified that Wyeth had wanted to stay with Webster, and the officer had placed Wyeth with Webster. The other officer testified he had to order Debra to deliver the child to Webster. Webster's friends testified they observed Webster and Wyeth together, and they had a normal, healthy relationship. Webster testified that all of Debra's allegations were investigated by the police and determined to be false. Webster also played the tape recording he made with Wyeth to prove that Wyeth was not reading a script, and that Wyeth was telling his father that Debra was "mad" all the time and that Wyeth had run away "to get away from her".

On January 24, 2001, the judge brought Wyeth in for yet another interview in chambers, this time putting him under oath without giving notice to either side. The judge aggressively demanded that Wyeth say he had been kidnapped two years earlier, and Wyeth said he had.

Within a few days, the judge released the transcripts of the interviews. Webster read the transcripts and immediately objected to the coaching of his son by his ex-wife. He moved for a Mistrial/Strike/730 evaluation citing Wyeth's dozens of memory lapses, among other problems. The trial judge denied Webster's motion for a Mistrial/Strike, and failed to rule on the 730 Evaluation.

After the trial, the divorce judge slashed Webster's visitation from 20% to one hour a month with his teenage son, and required that a court-approved psychologist monitor the visitation.

Webster appealed, but the judgment was affirmed.

REASONS FOR GRANTING THE PETITION

In 2001, a California family law court permanently terminated all contact between a father and his son.[1]

In doing so, the state court relied on an extreme interpretation of a California state law. However, this extreme interpretation of state law clearly conflicts with prior decisions by this Court.

Further, the family law judge virtually eliminated Webster's constitutionally protected interest in the care, custody, and companionship of his child without due process.

This Court must grant this petition in order to guide family law courts throughout the nation on a question that affects more than one million children a year who are caught in the divorce of their parents.

In virtually terminating all contact between Webster and his teenage son, the family law judge relied on a portion of California Family Code Section 3020, subd. (b). The entire section states:

> "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to

[1] The decision cited in Appendix B gives the father one hour a month of visitation. However, subsequent orders by the same divorce judge—which cannot be ignored in this petition—eliminate all visitation and also bar the father from talking to his son's school, doctor, or dentist. Needless to say, Webster does not know where his son goes to school, or who his son's doctor or dentist are, nor did anyone complain. Nevertheless, the divorce judge decided that Webster could not talk anyone connected to his son in any fashion. This further demonstrates a divorce judge who made absurdly oppressive and unjust orders that defy commonsense.

effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011."

In his decision, the family law judge ignored the rest of the code section and picked out the phrase that says "...except where the contact would not be in the best interest of the child..."

The rationale used by the family law judge was clear. Even though a firm distinction separates family law courts and juvenile courts in California—preserving the removal of children from their parents exclusively to juvenile courts (see *In re Chantal S.* (1996) 13 Cal.4th 196, 913 P.2d 1075, 51 Cal.Rptr.2d 866)—this family law judge decided that he could reach the same outcome by applying only a portion of this code section, and then using the most extreme interpretation possible.

The family law judge ignored all of the precedent from this Court, all of the safeguards in the California Welfare and Institutions Code Section 300, and more than twenty years of decisions by appellate courts throughout California!

That is one reason why this Court must grant this petition—to correct a decision that rested on inadequate state law grounds and that conflicts with a United States Constitutional principle.

More than twenty years ago, this Court made it abundantly clear that parents enjoy a constitutionally protected interest in raising their children. As this Court stated:

"The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental

> rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."
> *Santosky v. Kramer* 455 U.S. 745, 752-754, 102 S.Ct. 1388, 71 L.Ed.2d 599, 50 U.S.L.W. 4333 (1982)

In Santosky, a New York Family Court permanently terminated the parental rights of John and Annie Santosky to their three children based on the "preponderance of the evidence" standard. The decision was affirmed.

However, this Court reversed the New York court, stating "The minimum standard is a question of federal law which this Court may resolve. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." id., pp. 754-757.

This Court found that the preponderance of the evidence standard was insufficient: "The 'fair preponderance of the evidence' standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment." id., pp. 758-768, and this Court mandated a higher standard:

> "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A 'clear and convincing evidence' standard adequately conveys to the factfinder the level of subjective certainty about his factual Conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a

matter of state law properly left to state legislatures and state courts." id., pp. 768-770.

In the present case, there is no doubt that the California family law court relied on the lesser—and improper—standard of "fair preponderance of the evidence." Indeed, only if the case had been accepted by a dependency court would the higher standard of clear and convincing evidence been applied (*In re Angelia P.* (1981) 28 Cal.3d 908, 623 P.2d 198, 171 Cal.Rptr. 637).

But no juvenile court wanted the case, the social worker from the Department of Child and Family Services found no abuse, and the family law judge was left to apply the lesser standard of "preponderance of the evidence" when he permanently terminated all contact between Webster and his teenage son.

Because California child custody orders are subject to modification at any time, the California court also claims that Webster's parental rights were not *permanently* terminated. Under California law, the court argued, Webster can return to family law court at any time and seek a modification.

This argument is utterly transparent.

To seek a modification of the custody order, Webster must demonstrate that a "significant change of circumstances" has occurred (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 913 P.2d 473, 51 Cal.Rptr.2d 444, *Burchard v. Garay* (1986) 42 Cal.3d 531, 724 P.2d 486, 229 Cal.Rptr. 800,*In re Marriage of Carney* (1979) 24 Cal.3d 725, 598 P.2d 36, 157 Cal.Rptr. 383).

However, since he has no contact at all with his son, nor is any information being given to him, Webster will never know when something has occurred that would allow him to seek a new custody order. And even if something significant did happen, and Webster somehow mysteriously found out, he would be

returning to the same family law judge who refused to let him see or talk to his child in the first place!

The outcome is not in doubt. A California family law judge did—in fact—terminate Webster's parental rights, violating the precedent of this court and both Webster's and Wyeth's constitutionally protected liberty interests.

Furthermore, the delay inherent in Webster's future attempts to even talk to his son is unacceptable. As this Court has stated: "...if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation." *Stanley v. Illinois* 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed.2d 551 (1972).

In Stanley, an unwed father lost his children for the sole reason that he was not married to the mother when she died. The Illinois court declared his children wards of the State and placed them with court-appointed guardians. Peter Stanley appealed the decision to the Illinois Supreme Court, but lost. However, on review, this Court reversed the Illinois court.

Once again, this Court upheld a parents' constitutionally-protected rights to raise his children despite the heavy-handed conduct of a state trial court.

In Stanley, this Court clearly defined the protection afforded to parents by stating that this constitutionally protected interest "undeniably warrants deference and, absent a powerful countervailing interest, protection." and that parents are "constitutionally entitled to a hearing on their fitness before children are removed from their custody." id. p. 651.

And in 1996, when this Court faced a state court that terminated yet another parents' rights, this Court again reversed.

In *M.L.B. v. S.L.J.* 519 U.S.102, 117 S.Ct. 555

(1996), M.L.B. was the mother of two children. After divorcing the father, S.L.J., her two children lived with the father. Several years later, S.L.J. returned to court and asked the Mississippi Chancery Court to terminate the parental rights of M.L.B. and to allow his new wife to adopt the children. The court did so. M.L. B. tried to appeal, but she could not afford the thousands of dollars in fees required to pay for the transcripts.

This Court stepped in and reversed the Mississippi court, holding that a state cannot prevent an indigent parent from appealing an order terminating parental rights because he or she cannot afford the fees to prepare the trial record.

Finally, though this Court does not yet have the record to review, the decision to permanently terminate all visitation between Webster and his teenage son was just plain wrong. When this Court reviews the trial proceedings, the mean-spirited and one-sided nature of the decision by the family law judge will be revealed.

During the 13 day trial, Webster easily contradicted all of the allegations by his ex-wife. Indeed, Webster called two police officers who corroborated crucial pieces of his testimony. This testimony was never impeached by Debra. However, Debra did not need to impeach the police officers or other sworn testimony introduced by Webster because the family law judge utterly ignored every piece of evidence and every argument put forth by Webster.

When a family law judge completely ignores one side to a custody dispute, an injustice occurs. Not just to the father, but to the victimized child, as well.

Webster prays that this Court grant this petition and give clear guidance to the thousands of family law courts throughout the Unites States on an issue that affects the lives of millions of parents and children each year.

CONCLUSION

This Court must address the important question of child custody that has not been, but should be, settled.

Previous decisions by this Court clearly affirmed the rights of a parent to care, custody, and companionship of his child. However, a family court has violated those rights.

We ask this Court to review a state court decision that rested on inadequate state law grounds and that conflicted with this Court's prior decision.

We also ask this Court to recognize the enormous consequences of a state court virtually terminating a father's parental rights, and using a transparent and wholly superficial argument as the basis for such a result.

With approximately 50% of all marriages ending in divorce, and millions of children being drawn into the aftermath of the failed relationship, the precedent setting power of this Court is crucial to protect not just the parents' rights to raise their children, but the children's rights to be raised by their parents.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Flowers
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

In re the Marriage of Debra and Webster Watnik.	E029628 (Super.Ct. RFL06429)
Debra Kniesley, Respondent, v. Wwbster Watnik, Appellant.	OPINION September 13, 2002

Appeal from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. Affirmed.

John Flowers for Appellant.

Timothy Pittullo and Christopher R. Abernathy for Respondent.

Richard Pfeiffer, under appointment by the Court of Appeal, for minor.

The short-lived marriage of Webster Watnik and Debra Kniesley produced one child, the "intelligent" and "engaging" Wyeth Watnik. It has also produced more than a decade's worth of work for the family court of San Bernardino County. Now it is the appellate court's turn.

The trial court found, among other things, that Webster "is a man without a sense of decency or morality"; that he had inflicted "emotional abuse" on Wyeth; and that he "is not to be entrusted in any fashion with [Wyeth's] upbringing . . . ." It therefore modified Webster's visitation with Wyeth, reducing it to just one hour per month and ordering that it be monitored by a psychologist.

Webster appeals. Among other contentions too numerous to list here, he contends that the trial court allowed Debra to relitigate allegations which had already been the basis of previous findings and orders; that the trial court relied on Wyeth's testimony even though it was "coached" and untrustworthy; and that various findings are not supported by substantial evidence. We find no reversible error. Hence, we will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Preliminarily, in his reply brief, Webster points out that Debra has repeatedly violated California Rules of Court, rule 14(a)(1)(C) by stating facts without citation to the record. He asks us to disregard all such statements in her brief. We agree that Debra has violated the rule. We expect more assistance from counsel, particularly in such a lengthy and tortuous case as this. However, we have taken both parties' statements of fact with a grain of salt; we have relied on them if, and only if, they are relevant as well as supported by our own review of the record. Thus, we exercise our discretion to disregard the noncompliance. (Cal. Rules of Court, rule14(e)(2)(C).)

Webster and Debra were married in 1988. In July 1989, Wyeth was born. In 1991, Debra filed this action for dissolution of marriage. In 1992, a judgment of dissolution was entered. By stipulation, the parties were awarded joint legal custody of Wyeth; Debra was awarded primary physical custody, and Webster was allowed specified visitation.

On September 23, 1996, the trial court (per Judge Raymond P. Van Stockum) modified the judgment, awarding Debra sole legal custody and reducing Webster's visitation. It added: "The award of sole legal custody specifically includes the right to cut the child's hair." On March 4, 1997, the trial court further reduced Webster's visitation and ordered: "Parties

shall let the minor child participate in sports with parents supporting him."

A. DEBRA'S 1998 OSC.

Some time thereafter, Judge Van Stockum recused himself. The case was reassigned to Judge J. Michael Gunn.

On January 30, 1998, Debra filed an order to show cause (OSC), seeking to reduce Webster's visitation even further. She alleged, among other things, that Webster had violated court orders by failing to take Wyeth to play in baseball games and by cutting Wyeth's hair.

On February 23, 1998, Webster filed an OSC regarding custody and visitation; the OSC itself, however, is not in the record.

On April 15, 1998, the trial court set a hearing on all issues raised by these and other pending OSC's, other than custody and visitation; the same hearing was to serve as a trial-setting conference on issues of custody and visitation. This hearing was continued many, many times.

On May 28, 1998, Webster filed another OSC regarding custody and visitation; it, too, is not in the record.

On August 31, 1998, the trial court held an evidentiary hearing on all three OSC's. It did not make any findings in connection with Debra's OSC. In connection with Webster's February and May 1998 OSC's, however, it found "no substantial change of circumstances." It then continued the hearing on all three OSC's to the next day.

On September 1, 1998, the trial court further continued the hearing on Debra's 1998 OSC. In connection with Webster's February 1998 OSC, it ordered him to complete "a 52-week parenting/anger class." However, it also continued the hearing on that OSC. It purported to deny Webster's May 1998 OSC;

nevertheless, it also continued that hearing.

On January 19, 1999, at the continued hearing on all three OSC's, the trial court further continued Debra's 1998 OSC. In a written statement of decision regarding Webster's OSC's, it noted each allegation Webster was making; it found each allegation, essentially, not true; and it concluded: "[T]here ha[s] been no substantial change of circumstances warranting any change of custody or visitation by the Order to Show Cause brought by [Webster]." It once again ordered Webster to complete one-year parenting and anger management classes.

B. WYETH'S 1999 OSC.

On February 11, 1999, Wyeth's counsel filed an OSC, seeking to terminate Webster's visitation. She alleged that, on February 9, 1999, sometime between 11 p.m. and 12:30 a.m., Webster had kidnapped Wyeth from Debra's home. Webster maintained that Wyeth had run away from home and had walked to his house. He denied entering Debra's home.

The trial court issued a temporary restraining order (TRO) that there be "no contact" between Webster and Wyeth. It gave Wyeth's OSC priority over all other then-pending OSC's in the case. On February 16 and 17, 1999, it held a hearing on Wyeth's OSC. At the end of the hearing, it took the matter under submission; however, it allowed Webster to have telephone contact with Wyeth daily, between 5 and 6 p.m.

On April 13, 1999, it issued its written ruling. It declined to decide whether Webster had, in fact, entered Debra's house. It did find, however, that "[Webster] transported [Wyeth] from [Debra]'s residence -- either inside or outside -- to [Webster]'s residence." It concluded that "[Webster] facilitated and aided his son to leave [Debra]'s residence in the middle of the night, without notifying [Debra] until requested to do so by a deputy sheriff. This was in violation of

the court's order re: custody and visitation."

The trial court therefore further reduced Webster's visitation; beginning May 7, 1999, he could have visitation on alternate weekends and on specified holidays. However, once he completed a "fifty-two week counseling and/or parenting program," he would be allowed the same visitation as before.

Judge Gunn then recused himself. The case was reassigned to Judge Frederick Mandabach.

C. DEBRA'S JUNE 1999 OSC.

On June 17, 1999, Debra filed an OSC, seeking to suspend Webster's visitation entirely until her 1998 OSC could be heard. She alleged, among other things, that Webster had contacted Wyeth at his school; had disparaged her to Wyeth; had verbally abused her father (Wyeth's grandfather) in Wyeth's presence; had left messages on her answering machine for Wyeth, disparaging her; and had failed to give Wyeth certain prescription medicine, as well as to return the medicine to Debra.

Meanwhile, the minor's counsel alleged that Webster had made Wyeth sign blank sheets of paper on which Webster had thereafter typed statements. She also alleged that Webster had made Wyeth read statements from a script while Webster tape-recorded him.

At a hearing on August 3, 1999, the trial court issued a TRO prohibiting Webster from tape-recording Wyeth or discussing the case with him. It refused to decide any pending matter on the merits; it reserved all custody issues to the time of trial.

D. DEBRA'S AUGUST 1999 OSC.

On August 9, 1999, Debra filed an OSC, once again seeking to suspend Webster's visitation. She alleged that Webster had made Wyeth sign blank written

statements and tape-record scripted oral statements; had sent a letter to her neighbors stating that Wyeth was likely to run away and asking them to call if they saw him; and had sent a letter to local attorneys accusing Wyeth's counsel of unethical behavior.

At a hearing on August 12, 1999, the trial court issued a TRO suspending Webster's visitation.

E. THE TRIAL.

On December 15, 2000, the case was called for trial before Judge Thomas R. Murphy. The trial court interviewed Wyeth in camera, in the presence of his counsel. Webster specifically stated that he did not object to this procedure. Wyeth was then 11 years old. He was not under oath. He said Webster had indeed "kidnapped" him: "He came into my house and took me." He added, "He scared me into not telling anybody." He also said that, provided Webster successfully completed an anger management class, he would like to have supervised visitation with him in the summer. Later that day, the trial court declared a mistrial.

On January 16, 2001, the case was called for trial again, this time before Judge Ben T. Kayashima. The trial court interviewed Wyeth in camera again. Webster did not object. Once again, Wyeth was not under oath and his counsel was present. When asked about the alleged kidnapping, he said Webster came in the house, woke him up, walked him outside and drove him away. He repeated that he wanted supervised visitation in the summer, after Webster completed an anger management class. He said Debra had encouraged him to visit Webster, but he did not feel ready to do so yet.

Later during the trial, the trial court announced that it intended to interview Wyeth in camera yet again. Webster did not object. This time, Wyeth was placed under oath. He confirmed his earlier

description of the kidnapping incident. He denied walking down the road on his own: "I won't even walk to the end of the house at night." He still wanted visitation with Webster in the summer.

On January 26, 2001, the trial court released transcripts of all three in camera sessions to the parties. On February 5, 2001, Webster moved to strike all of Wyeth's statements; for a mistrial; or for a psychological evaluation. The trial court denied the motion to strike and the motion for a mistrial. It took the motion for a psychological examination under submission. Later that day, it denied the motion for a psychological examination.

On February 6, 1999, Webster called Wyeth as a witness. Thus, Wyeth testified under oath, in open court. Regarding the kidnapping incident, he testified that Webster did come in his bedroom that night and that he had lied when he said he ran away. Yet again, he said he wanted visitation with Webster in the summer. He did not think Debra would "have any problem with that[.]"

On February 7, 2001, both sides rested, and the trial court took the matter under submission.

F. THE ORDER APPEALED FROM.

On April 2, 2001, the trial court issued a statement of decision. It concluded that the allegations of Debra's 1998, June 1999, and August 1999 OSC's had been proven and that they "constitute[d] a substantial change of circumstances . . . justify[ing] a change in visitation." It therefore reduced Webster's visitation to just one hour per month, to be monitored by a psychologist.

The trial court found that Debra's 1998 OSC had not been previously heard or adjudicated. Based on that OSC, it made the following findings:

Finding No. 18: In violation of a then-existing court order, Webster had failed to take Wyeth to baseball

games and to a team-picture-taking event.

Finding No. 19: In violation of a then-existing court order, Webster had "cut Wyeth's hair on at least two occasions . . . ."

Based on Debra's June 1999 OSC, the trial court made the following findings:

Finding No. 20: In April and May 1999, in violation of then-existing court orders, Webster had contacted Wyeth at his school; on May 19, 1999, in Wyeth's presence, he had made "inappropriate remarks" to Debra and "flipped [her] off."

Finding No. 21: On May 7, 1999, when Webster picked up Wyeth for visitation, Debra's father had escorted Wyeth to Webster's car; "for no apparent reason," Webster then verbally abused and threatened Debra's father.

Finding No. 22: When Wyeth went to visit Webster over the weekend of June 4-6, 1999, Debra had sent prescription ear medicine with him; Webster "intentionally" did not give Wyeth the medicine and did not return the medicine to Debra.

Finding No. 24: Between February and May 1999, when then-existing court orders allowed Webster to have telephone contact with Wyeth between 5 and 6 p. m., Debra did not refuse to let Wyeth have such contact; Wyeth just did not want to talk to Webster. Also, some of Webster's calls were not made between 5 and 6 p.m. Based on Debra's August 1999 OSC, the trial court made the following findings:

Finding No. 26: Webster had Wyeth sign blank pieces of paper, then typed false statements above Wyeth's signature; he also had Wyeth tape-record false statements, which Wyeth read from a script by Webster.

Finding No. 27: Webster sent fliers containing some of the false statements, impugning Debra, to residents of Debra's neighborhood; he also sent letters containing some of the false statements, impugning Wyeth's counsel, to attorneys throughout Southern

California.

Finding No. 28: "[Webster] lied about his participation in regards to the alleged kidnapping. . . . [H]e was indeed in [Debra]'s home and more specifically in [Wyeth's] bedroom and helped his son to his car and ultimately drove him to his own residence."

Finding No. 29: Webster had filed a civil suit against Wyeth's original counsel in an attempt -- ultimately successful -- to have her relieved from the case.

Finally, the trial court found:

Finding No. 30: Debra was "a loving and responsible mother . . . . For the most part of her testimony, she was credible." Debra was "more likely to allow Wyeth more frequent and continuing contact with [Webster]" than Webster was with her.

Finding No. 31: Wyeth was "a very intelligent child who [was] very engaging, very articulate and very credible."

Finding No. 32: "[Webster] was not credible during his testimony in this trial. [Webster] has demonstrated extremely poor judgment, not only during the course of this trial, but also [in] involving the minor child, Wyeth, in his elaborate scheme of laying a foundation of lies in his campaign against minor's counsel . . . and [Debra]. The campaign was motivated not so much [by] his love for his child, Wyeth, but rather his attempt to be in control . . . .

"[Webster] did not care enough to consider the consequences of his actions on the emotional well[-] being of the minor child. It is obvious that there is a reason why Wyeth cannot or refuses to recollect certain events. . . . [I]t is the product of emotional abuse inflicted upon Wyeth by [Webster], and it is but one example of such abuse.

"This is a man without a sense of decency or morality. . . . [Webster] will continue to present a danger to the emotional well[-]being of the minor child.

"[Webster's] character . . . is such that he is not to be entrusted in any fashion with the upbringing of the minor child, now or
ever."

II. DEBRA'S 1998 OSC

Webster contends the trial court erred by allowing Debra to "relitigate" the allegations of her 1998 OSC. The trial court, of course, found that Debra's 1998 OSC had never been ruled on. Webster disagrees.

First, Webster notes that, on August 31, 1998, the trial court found "no significant change of circumstances." He argues: "This order properly disposed of Debra's [1998] OSC."

We think not. Certainly, as a matter of the interpretation of the ruling itself, it did not. The trial court expressly made this ruling solely on Webster's then-pending OSC's. It continued the hearing on Debra's 1998 OSC.

As a matter of res judicata, the ruling likewise did not dispose of Debra's 1998 OSC. We recognize that "[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (In re Marriage of Mason (1996) 46 Cal.App.4th 1025, 1028, quoting Henry v. Clifford (1995) 32 Cal.App.4th 315, 321.) Here, however, Debra did not "withhold" the issues raised by her 1998 OSC. By continuing the hearing, the trial court prevented her from litigating them.

Alternatively, Webster argues that the trial court's January 19, 1999, statement of decision adjudicated Debra's 1998 OSC. Once again, however, the trial court expressly stated that it was ruling solely on Webster's OSC's. The statement of decision did not address any of the allegations of Debra's 1998 OSC. And, once again, the trial court continued the hearing

on her 1998 OSC, thus preventing her from litigating it.

Next, Webster argues that the trial court's April 13, 1999, ruling adjudicated Debra's 1998 OSC. At that time, however, the trial court ruled solely on Wyeth's OSC. For this purpose, it expressly gave Wyeth's OSC priority over all other pending OSC's. Its ruling did not mention or discuss any of the allegations of Debra's 1998 OSC. And, yet again, it expressly continued Debra's 1998 OSC.

Finally, Webster argues: "[T]he court completely ignored testimony from both Webster and Debra that her old allegations had been previously litigated . . . ." (Emphasis omitted.) This statement is not supported by the cited portions of the record. Debra made no such admission. At one point, Webster did testify: ". . . I took the stand and did deny the allegations [of the] 1/30/98 [OSC] . . . ." However, this does not prove that any court ever ruled on them.

We conclude that the trial court did not improperly allow Debra to "relitigate" the allegations of her 1998 OSC.

III. LACHES WITH RESPECT TO DEBRA'S 1998 OSC

Webster contends that Debra's 1998 OSC was barred by laches.

"The defense of laches requires unreasonable delay plus . . . prejudice to the defendant resulting from the delay." (Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 68, quoting Conti v. Board of Civil Service Commissioners (1969) 1 Cal.3d 351, 359.) The party claiming laches has the burden of proof. (Evid. Code, Section 500; People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 204.) "Generally, a trial court's laches ruling will be sustained on appeal if there is substantial evidence to support the ruling." (Johnson v. City of Loma Linda, supra, at p. 67.)

The trial court could reasonably find that the delay

in ruling on Debra's 1998 OSC was not Debra's fault. She filed it on January 30, 1998, and set it for hearing on February 23, 1998. On that date, the trial court bifurcated the issues of custody and visitation; it indicated that, at a hearing on April 27, 1998, it would hold a trial-setting conference on these issues. It then repeatedly continued the April 27, 1998, hearing. At one intermediate hearing, on February 16, 1999, Debra's counsel complained to the trial court about the fact that it had not yet held a hearing on her 1998 OSC, but without success. Likewise, in another OSC which she filed on June 17, 1999, she pointed out that her 1998 OSC had been pending for over a year, and she asked for a "no contact" order until it was ruled on.

Finally, on September 2, 1999, the court set a trial date, which it subsequently continued to February 3, 2000. On that date, however, it ordered the matter off calendar, as "not ready for trial." There is no indication that this was Debra's fault. On December 15, 2000, the trial began. There is no indication that Debra could have obtained an earlier trial date. That same day, the trial court declared a mistrial. On January 16, 2001, the trial that gave rise to this appeal began.

The trial court took judicial notice of the entire court file. Based on this record, it could find that Debra did everything she reasonably could to obtain a hearing on her 1998 OSC and hence that she was not guilty of laches.

The trial court could also reasonably find that the delay did not prejudice Webster. First, he claims he was prejudiced because Debra repeatedly testified that she could not remember pertinent facts. However, he fails to support this with a citation to the record. (Cal. Rules of Court, rule 14(a)(1)(C).) In any event, this would seem prejudicial to Debra, not to Webster. Second, he now claims he could not contact witnesses, such as Wyeth's Little League coaches. However, he cites no evidence that he ever tried to do so. Third, he

claims Debra used the delay to coach Wyeth. There was no evidence, however, that Wyeth was coached. Webster claims "Wyeth acknowledged Debra told him what to say," but this statement is not supported by the cited portion of the record.

Webster also claims the trial court "admitted" that Debra had coached Wyeth. Again, this claim is not supported by the cited portion of the record. In it, the trial court merely acknowledged that coaching "[h]appens all the time" and assured Webster that it could "take that into consideration." Even assuming the trial court could have inferred that Wyeth had been coached, it was not required to do so. Thus, the trial court could also reject Webster's laches claim based on his failure to show prejudice.

IV. THE "KIDNAPPING" ALLEGATION

Webster contends the trial court erred by allowing Debra to relitigate the claim that he had "kidnapped" Wyeth.

A. Additional Factual and Procedural Background.

Wyeth's 1999 OSC had alleged that Webster kidnapped Wyeth. On February 16 and 17, 1999, the trial court held a hearing on that OSC; and on April 13, 1999, it issued a written ruling on it.

At trial, the court acknowledged that the kidnapping incident had been the subject of a previous hearing and previous findings. It held, however, that it could still reach the issue, for four reasons. First, it explained that the previous findings did not include "a specific finding about the alleged kidnapping." It also noted that Wyeth had not testified at the previous hearing. Second, it found that, after the previous findings were made, "[Webster] undertook a campaign to discredit both [Wyeth]'s counsel . . . and [Debra] by intentionally involving . . . Wyeth." Third, it found that

Webster had "reintroduced these issues" by filing an OSC on July 9, 1999, and a supplemental declaration on August 3, 1999. Fourth, it stated that it was making its finding regarding the kidnapping pursuant to the OSC Debra had filed on August 9, 1999.

B. DISCUSSION.

"Under the so-called changed circumstance rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification." (Montenegro v. Diaz (2001) 26 Cal.4th 249, 256.) "Otherwise, dissolution cases would have no finality and unhappy former spouses could bring repeated actions for modification with no burden of showing a justification to change the order. . . . Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order." (In re Marriage of Biderman (1992) 5 Cal.App.4th 409, 412-413, quoting In re Marriage of Smith (1990) 225 Cal.App.3d 469, 480.)

It follows that a permanent custody order is entitled to res judicata and collateral estoppel effect with respect to the circumstances that existed at the time. (See Wodicka v. Wodicka (1976) 17 Cal.3d 181, 188; In re Marriage of Maxfield (1983) 142 Cal.App.3d 755, 759.) Nevertheless, in some instances, a family law court can revisit circumstances which it has already considered. One of these is when the family law court cannot see the "big picture" unless it takes into account such previous circumstances in combination with subsequent developments. (In re Marriage of Schaffer (1999) 69 Cal.App.4th 801, 803-804, 807-812.)

The trial court ruled that it could consider the alleged kidnapping because -- among other things -- it was pertinent to an OSC Webster had filed on July 9,

1999, a responsive declaration Webster had filed on August 3, 1999, and an OSC Debra had filed on August 9, 1999. Webster's July 9, 1999, OSC is not in the clerk's transcript. Without it, we can hardly say the trial court erred. "It is well settled . . . that a party challenging a judgment has the burden of showing reversible error by an adequate record." (Ballard v. Uribe (1986) 41 Cal.3d 564, 574.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]." (Hernandez v. California Hospital Medical Center (2000) 78 Cal. App.4th 498, 502.) We would sustain the trial court's ruling for this reason alone.

Separately and alternatively, the trial court did have to revisit the kidnapping in order to rule on Webster's August 3, 1999, responsive declaration and Debra's August 9, 1999, OSC. In his responsive declaration, Webster requested sole custody. He alleged that, in May 1999, in a tape-recorded interview, Wyeth had said he had not been kidnapped. He also alleged that, in June 1999, Wyeth had signed a written statement saying he had not been kidnapped, but minor's counsel wanted him to say he was. In her OSC, Debra alleged that Webster had sent a letter to everyone in her neighborhood which stated: "This past February, Wyeth ran away from his mother's house and came home to me. . . . Since I live about a mile from my ex-wife, I'm concerned that my son will continue to run away until he can stay with me. . . . I'm concerned for my son's safety. . . . If you come across my son, please call me."

The trial court could not adjudicate these allegations without deciding whether Webster did or did not take Wyeth from Debra's house. If he did, then the trial court could find that Wyeth's subsequent statements did not show any changed circumstances. Moreover, if he did, then the trial court could find that Webster's letter to Debra's neighbors, saying Wyeth had run away once and was likely to do so again, was

sent in bad faith to harass Debra. The earlier finding that Webster had helped Wyeth to leave the house by driving him away was inadequate for their purposes. It shed no light on whether Wyeth ran away or Webster took him. In sum, the trial court had to reconsider the alleged kidnapping in order to place these subsequent developments in the "big picture."

Webster also makes several points regarding the alleged kidnapping that have nothing to do with res judicata. None of these, however, is made under a separate heading or subheading, as required. (Cal. Rules of Court, rule 14(a)(1)(B).) Thus, if they are intended to be separate claims of error, they have been waived. (Lester v. Lennane (2000) 84 Cal.App.4th 536, 586.)

Alternatively, these points lack merit. First, Webster argues: "Debra did not even re-allege her kidnapping allegation in her pleadings . . . ." Once again, without Webster's July 9 OSC, we do not have an adequate record on which to evaluate this claim. Even if true, it would be irrelevant: "It has long been the law when a case is tried on the merits and the issues are thoroughly explored during the course of the trial and the theory of the trial is well known to the court and counsel, the fact the issues were not pleaded does not preclude adjudication of such litigated issues and a review of such issues on appeal." (Professional Hockey Corp. v. World Hockey Assn. (1983) 143 Cal. App.3d 410, 418.) And finally, it is not true. As we have just discussed, the allegations of Webster's August responsive declaration and Debra's August OSC did raise factual issues regarding the alleged kidnapping.

Second, Webster argues: "Debra's attorney specifically said he did not want to re-litigate [the kidnapping allegation]." Although her attorney did say something like this at one point, he obviously did not intend to abandon the issue for all purposes, as he then proceeded to introduce extensive testimony about

the alleged kidnapping.

Third, Webster argues, essentially, that there was insufficient evidence to support the trial court's finding. In so doing, however, he discusses only the evidence favorable to him; he omits to mention the contrary evidence. For this reason, too, this contention has been waived. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881; Oliver v. Board of Trustees (1986) 181 Cal.App.3d 824, 832 [Fourth Dist., Div. Two].) In any event, the finding is more than adequately supported by Wyeth's testimony in open court. We will discuss Webster's contention that the trial court erred by relying on Wyeth's testimony in part VI, post.

We conclude that the trial court properly reconsidered and made new findings regarding the alleged kidnapping.

V. DEBRA'S JUNE 1999 AND AUGUST 1999 OSC'S

Webster contends the trial court erred by finding a substantial change of circumstances based on the allegations of Debra's June 1999 and August 1999 OSC's.

He argues that the allegations of these OSC's had already been adjudicated on August 3, 1999. (On August 9, 1999, Debra filed a new OSC -- hence Webster's claim that "Debra rushed back to family court every six days . . . .") At that hearing, however, both sides asked "that any other matters not wrapped up should go over" to the date set for trial. The trial court agreed. It therefore issued several restraining orders -- including an order that Webster not tape Wyeth --but indicated it was not ruling on the merits. It stated: ". . . I don't want to sit here and try to figure out who's right or who's wrong or anything else." Thus, it is clear that, at that hearing, the trial court did not finally adjudicate any OSC.

He also argues that some of the trial court's

findings went beyond the allegations of the OSC's. He has not provided an adequate record to support this argument. (See part IV.B, ante.) Additional allegations might have been made in his responsive declarations, not all of which are in the record. (Fam. Code, Section 213, subds. (a), (b)(3); Brody v. Kroll (1996) 45 Cal. App.4th 1732, 1735-1736.) Also, as already discussed (see part IV.B, ante), the trial court could properly decide issues that had been fully tried, regardless of whether they had been alleged in the pleadings.

Webster's main argument is that there was insufficient evidence to support the trial court's findings on these OSC's. Once again, however, he "cherry-picks" only the evidence favorable to him. Thus, he has waived this argument. (See part IV.B, ante.)

We conclude that the trial court did not err in finding a substantial change of circumstances.

VI. RELIANCE ON WYETH'S TESTIMONY

Webster contends the trial court erred by finding "emotional abuse" based on Wyeth's testimony.

First, Webster argues that, before the trial court could find emotional abuse, it had to find that (1) Wyeth had suffered serious emotional damage and (2) Webster caused the emotional damage. He cites juvenile dependency cases. (In re Brison C. (2000) 81 Cal.App.4th 1373, 1378-1382; In re John W. (1996) 41 Cal.App.4th 961, 975-977; In re Joel H. (1993) 19 Cal. App.4th 1185, 1202-1203; In re Alexander K. (1993) 14 Cal.App.4th 549, 557-561; In re Sarah M. (1991) 233 Cal.App.3d 1486, 1498-1500, disapproved on other grounds in In re Chantal S. (1996) 13 Cal.4th 196, 204.) These cases all involved the sufficiency of the evidence to support an allegation that "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal,

or untoward aggressive behavior . . . , as a result of the conduct of the parent or guardian . . . ." (Welf. & Inst. Code, Section 300, subd. (c).) In this family law case, the trial court could find "emotional abuse" regardless of whether the statutory requirements for juvenile dependency jurisdiction were met. In any event, if indeed such findings were required, we would have to presume the trial court made implied findings to this effect. (Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal.3d 304, 309-310; In re Marriage of Cohn (1998) 65 Cal.App.4th 923, 928.)

Second, Webster argues that the trial court displayed bias against him. He waived this point by failing to argue it under a separate heading. (See part IV.B, ante.) He also forfeited it by failing to raise it in a prompt writ petition. A statutory claim of judicial bias cannot be raised on appeal. (Code Civ. Proc., Section 170.3, subd. (d); People v. Brown (1993) 6 Cal.4th 322, 335-336, cert. den. (1994) 513 U.S. 845 [115 S.Ct. 138, 130 L.Ed.2d 79]; People v. Barrera (1999) 70 Cal. App.4th 541, 548-552; Roth v. Parker (1997) 57 Cal. App.4th 542, 547-549.) Failure to pursue a statutory bias claim will also bar a non-statutory, constitutional bias claim. (People v. Brown, supra, at pp. 335-336; Roth v. Parker, supra, at pp. 547-549.) We also note that Webster waived any non-statutory, constitutional bias claim by failing to raise a constitutional issue below. (Roth v. Parker, supra, at pp. 548-549.)

We hasten to add that we do not believe the trial court displayed any bias whatsoever. "[D]isqualification is required where, for any reason, 'a person aware of the facts might reasonably entertain doubt that the judge would be able to be impartial.' Where, as here, the underlying events are not in dispute, disqualification on this ground becomes a question of law which this court may determine. [Citation.]" (Sincavage v. Superior Court (1996) 42 Cal. App.4th 224, 230, fn. omitted, quoting Code Civ. Proc., Section 170.1, subd. (a)(6)(C).)

Webster argues that the trial court's third interview of Wyeth demonstrated bias because the trial court (1) requested the interview, (2) did not state ahead of time that it was going to place Wyeth under oath, (3) asked "leading and suggestive questions," and (4) did not ask any questions about Debra. The trial court, however, had also requested its previous interview of Wyeth. Judge Murphy, too, had requested an interview. Wyeth was obviously a key witness; the court needed to hear from him.

The fact that the trial court placed Wyeth under oath is a complete red herring. The point of all three interviews was to obtain admissible testimony from Wyeth. Webster had agreed to the first two interviews—and to the third one, too—without even asking whether Wyeth would be under oath. Webster had not yet read the transcripts of the first two interviews; thus, for all he knew, Wyeth had been under oath in them. All three interviews ended up coming into evidence. Webster does not claim it was error to admit the first two interviews, which were not under oath. We therefore cannot see how he was prejudiced or surprised when Wyeth was placed under oath in the third.

We do not agree that the trial court asked unduly leading or suggestive questions. According to Webster, the trial court "demanded that Wyeth say he had been kidnapped . . . ." In the first and second interviews, however, Wyeth had already said he had been kidnapped. In the third interview, the trial court read back some of Wyeth's statements about the kidnapping from the second interview, then asked, "[I]s that how it happened?" Wyeth said it was. The trial court then proceeded to ask some more questions, which had not been asked before, about Webster's role in the kidnapping. Obviously, a kidnapping had already been established; the trial court read back Wyeth's prior statements simply to prime the pump.

Finally, Webster's statement that the trial court

"did not ask about Debra at all" is not true. For example, it asked Wyeth, "[Did] anyone, including your mother, . . . ever suggest to you or tell you as to what to say to the judges or to anybody as to how that event took place?" In any event, it had already asked about Debra in the prior interviews. Thus, we perceive no indication of judicial bias.

Third, Webster argues that Wyeth's testimony was unreliable. We have already rejected Webster's contention that the trial court had to find that Wyeth had been coached. (See part III, ante.) Webster notes that, up until the trial, Wyeth had denied being kidnapped or abused in any way. It was only at trial, after being in Debra's custody and denied visitation with Webster for 18 months, that he finally admitted being kidnapped. Webster concludes: "It was an error to rely so completely on Wyeth's latest statements -- and ignore his earlier ones -- in finding that Webster was an 'emotional abuser.'" Precisely because Wyeth's statements were inconsistent, however, it was up to the trial court to decide which ones were credible. Wyeth's pretrial statements were made to police officers, social workers, and others, at a time when he wanted to protect his father. The trial court could reasonably conclude that his in-court statements, made (or confirmed) under oath, were true, but that his unsworn, out-of-court statements were false.

Webster cites cases involving the "child dependency exception" to the hearsay rule, under which hearsay statements by a child who has been found incompetent to testify at trial may nevertheless be admissible. (In re Cindy L. (1997) 17 Cal.4th 15, 28-30; In re Nemis M. (1996) 50 Cal.App.4th 1344, 1353-1355; In re Carmen O. (1994) 28 Cal.App.4th 908, 918-922.) These cases are irrelevant. Wyeth was competent to testify and did testify.

Webster also argues that the teachers, police officers, social worker, mediator and psychologist involved with Wyeth were all mandated reporters

under the Child Abuse and Neglect Reporting Act (Pen. Code, Section 11165.7, subd. (a)) but did not report that Wyeth was being abused. A mandated reporter, however, is not required to report emotional abuse. (Pen. Code, Section 11166.05.) Also, it does not appear that any of these people knew that Webster was making Wyeth tape-record and sign false statements. After all, Webster only began doing so after Wyeth had spoken to most of them. The trial court, however, found "emotional abuse" based largely on this conduct -- Webster's "involving . . . Wyeth in his elaborate scheme of laying a foundation of lies . . . ."

Finally, Webster claims the trial court erred by failing to rule on his request for a psychological evaluation. He waived this claim by failing to set it forth under a separate heading. (See part IV.B, ante.) In any event, his factual premise is incorrect. The trial court did rule on the request -- it denied it. Webster does not argue that the denial was error.

VII. FINDING THAT WEBSTER HAD PRESENTED "NO EVIDENCE"

Webster contends the trial court erred by finding that "there has been no evidence presented or argued by [Webster] . . . ." He argues that "[he] presented substantial evidence at trial." (Emphasis omitted.)

This grossly misrepresents the trial court's finding. Actually, the trial court found: "This Court, at the outset of the hearing, instructed each party litigant to present a list of all outstanding motions and responsive declarations seeking affirmative relief that have not yet been ruled upon . . . . [Webster] has submitted his list consisting of 19 entries . . . from March 27, 1998 through November 14, 2000. . . . This Court finds that either [Webster]'s request had been dealt with by this Court's present findings and order or there has been no evidence presented or argued by [Webster] . . . ." (Italics added.) Thus, the trial court's

finding related to OSC's other than the ones that formed the basis of its ruling.

Webster also contends the trial court erred by refusing to admit Exhibit 109. He waived this argument by failing to state it under a separate heading (see part IV.B, ante) and by failing to support it with reasoned argument and citation of authorities. (Cal. Rules of Court, rule 14(a)(1)(B); Schubert v. Reynolds (2002) 95 Cal.App.4th 100, 108-109.)

Even if not waived, the contention lacks merit. Exhibit 109 purports to be a letter from one David Riles, of the Department of Children's Services, stating his opinion that it would be in Wyeth's best interest to continue to have visitation with Webster. There was no testimony about how the letter was prepared. Moreover, Riles was never shown to be an expert. Thus, the letter was inadmissible both as hearsay (Evid. Code, Section 1200; see also Evid. Code, Sections 1270, 1280) and as improper opinion testimony. (Evid. Code, Sections 800, 801.) The fact that no party objected is not controlling. The trial court could exclude the exhibit on its own motion. (People v. Clark (1992) 3 Cal.4th 41, 144, cert. den. (1993) 507 U.S. 993 [113 S.Ct. 1604, 123 L.Ed.2d 166]; Gherman v. Colburn (1977) 72 Cal.App.3d 544, 581.)

Finally, Webster contends the trial court erred by finding that he was "not credible." He has waived this argument by failing to set it forth under a separate heading and by failing to discuss all of the relevant evidence. (See part IV.B, ante.) In any event, he argues that the error arose "because the court ignored [his] case in its entirety . . . ." As we have just noted, that is not what the trial court did.

VIII. REDUCTION OF WEBSTER'S VISITATION

Webster contends the trial court erred by reducing his visitation to one hour per month.

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (Montenegro v. Diaz, supra, 26 Cal.4th at p. 255, quoting In re Marriage of Burgess (1996) 13 Cal.4th 25, 32.) "Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice." (People v. Coddington (2000) 23 Cal.4th 529, 587-588, cert. den. (2001) 531 U.S. 1195 [121 S.Ct. 1199, 149 L.Ed.2d 113], overruled on other grounds in Price v. Superior Court (2001) 25 Cal.4th 1046, 1069, fn. 13.)

"If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1143-1144.)

First and foremost, Webster argues that there was insufficient evidence to support the trial court's findings (1) that he had inflicted "emotional abuse" on Wyeth and (2) that Debra was more likely to allow frequent and continuing contact with Webster than Webster was with Debra. He has waived this contention by failing to set forth all of the evidence pertinent to these findings. (See part IV.B, ante.)

Second, Webster argues that a parent has a liberty interest in the care and custody of his or her child. "Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect." (In re Marilyn H. (1993) 5 Cal.4th 295, 307.) "Cases which hold that deference is to be

accorded to parental rights do so in part on the assumption that children's needs generally are best met by helping parents achieve their interests. In some situations, however, children's and parents' rights conflict, and in these situations, the legal system traditionally protects the child." (Adoption of Daniele G. (2001) 87 Cal.App.4th 1392, 1404 [Fourth Dist., Div. Two], quoting In re Bridget R. (1996) 41 Cal. App.4th 1483, 1504.) Thus, "it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have . . . dissolved their marriage, . . . except where the contact would not be in the best interest of the child . . . ." (Fam. Code, Section 3020, subd. (b), italics added.)

Third, he argues that the trial court, in essence, terminated his parental rights and that only the juvenile court has jurisdiction to do this. Not so. The family court, acting pursuant to the Family Code, has jurisdiction to remove a child from one parent's custody entirely. (Fam. Code, Sections 3021, 3022, 3040; e.g., In re Marriage of Kim (1989) 208 Cal. App.3d 364, 371-372.) The juvenile court, acting pursuant to the Welfare and Institutions Code, has jurisdiction to terminate parental rights. Even assuming these two results are equivalent, each is within the jurisdiction of the specified court when it follows the specified statutory procedure. Moreover, they are not equivalent. For example, a family court order removing a child from a parent's custody can be modified based on changed circumstances (see part IV. B, ante); a juvenile court order terminating parental rights cannot. (Welf. & Inst. Code, Section 366.26, subd. (i).)

Webster points out that many juvenile dependency findings, unlike family law custody findings, require proof by clear and convincing evidence. He does not argue, however, that the trial court erred by failing to apply the clear-and-convincing-evidence standard. He

waived any such argument by failing to raise it below. (See In re Riva M. (1991) 235 Cal.App.3d 403, 411-412.)

Fourth, Webster argues that the trial court erred by disregarding Wyeth's expressed desire for continued visitation. "If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody." (Fam. Code, Section 3042, subd. (a).) "[T]he court is not bound to decide according to [a child's] preference and may award custody consistent with its finding of the best interest of the child[] [citations]." (In re Marriage of Hopson (1980) 110 Cal.App.3d 884, 907; accord, In re Marriage of Mehlmauer (1976) 60 Cal.App.3d 104, 110 [Fourth Dist., Div. Two].) "With children 10 and 13 years of age . . . it is peculiarly the function of the trial judge to determine what consideration is to be given, if any, to their expressed preference as to custody." (In re Marriage of Rosson (1986) 178 Cal.App.3d 1094, 1103, disapproved on other grounds in In re Marriage of Burgess, supra, 13 Cal.4th at p. 38, fn. 10.) We perceive no abuse of discretion.

Fifth, he argues that he was entitled to "reunification services," including visitation. Reunification services are required only in juvenile dependency cases. (See Welf. & Inst. Code, Section 361.5.) Webster essentially asks us to extend this requirement to family law cases. He does not argue, however, that the existing distinction between juvenile dependency cases and family law cases violates the constitutional right to equal protection. For purposes of this case, it suffices to note that, in dependency terms, the trial court basically took custody from an offending parent and awarded it to a nonoffending parent; thus, even if this were a dependency case, the court would not have been required to order reunification services. (Welf. & Inst. Code, Section

361.2, subds. (a), (b).)

Finally, in a single sentence, Webster argues that "the family court compounded the errors by denying Webster any increase in visitation in the future [citation]." We find no such provision in the trial court's order. The portions of the record which Webster cites say no such thing.

We conclude that the trial court did not err by reducing Webster's visitation to one hour per month.

IX. ATTORNEY'S FEES

Webster contends the trial court erred by refusing to award attorney's fees to him and by reserving jurisdiction to make a future award of attorney's fees to Debra.

The trial court ruled that: "[T]he three Orders [t]o Show Cause filed by [Debra] ha[ve] been necessitated by the conduct of [Webster]. [Debra] shall be entitled to reasonable attorney fees and costs." It found, however, that: "[B]ased on [Webster]'s [income and expense] declaration, he does not have the present ability to pay [Debra]'s attorney fees as requested. . . . [S]hould evidence contrary to [Webster]'s declaration be submitted to the satisfaction of a court in the future, or if [Webster] obtains gainful employment and earns a sufficient salary, the finding may be otherwise. Accordingly, the Court reserves jurisdiction on this issue." It denied Webster's requests for attorney's fees.

Webster argues he was entitled to attorney's fees as sanctions because Debra had subjected him to certain supposedly frivolous motions. (See Fam. Code, Section 271; In re Marriage of Mason, supra, 46 Cal.App.4th at p. 1028.) It does not appear that he ever requested sanctions on this ground below. Moreover, he does not bother to articulate why he thinks these motions were frivolous. Except for Debra's 1999 OSC's, he has not included them in the appellate record. Thus, we can hardly say they were frivolous. Inasmuch as the trial

court ruled in Debra's favor on her 1999 OSC's, and we are sustaining its ruling, these particular OSC's manifestly were not frivolous.

Webster also claims Debra's lawyer's conduct led Judge Murphy to declare a mistrial. Not so. Although Judge Murphy might have stated the reason for the mistrial more clearly, it appears to have been that the trial was going to run longer than the time estimate and therefore he would not be available to hear it.

Webster's argument that the trial court erred by reserving jurisdiction to award Debra attorney's fees is not properly before this court. An order allowing a party moving for attorney's fees to renew the motion later is not appealable. "[Such a] ruling is in the nature of an interlocutory order directing that further proceedings be taken before a determination is made." (In re Marriage of Jafeman (1972) 29 Cal. App.3d 244, 268.) Similarly, an order reserving jurisdiction to award attorney fees is non-final and non-appealable. (Chapman v. Tarentola (1960) 187 Cal.App.2d 22, 25.) The merely hypothetical finding that Debra would be entitled to attorney's fees, if only Webster had the ability to pay, was not sufficiently final to be appealable. (See Griset v. Fair Political Practices Com. (2001) 25 Cal.4th 688, 698-699.) An order may have both final, appealable portions and interlocutory, non-appealable portions. (Degnan v. Morrow (1969) 2 Cal.App.3d 358, 362-365; La Jolla Casa deManana v. Hopkins (1950) 98 Cal.App.2d 339, 344.) The trial court's order is appealable in other respects. (Eldridge v. Burns (1978) 76 Cal.App.3d 396, 403-405.) We lack jurisdiction, however, to review its reservation of jurisdiction regarding attorney's fees.

We conclude that Webster has not shown any reversible error regarding attorney's fees.

X. DISPOSITION

The judgment is affirmed. Debra shall recover costs

on appeal against Webster.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/RICHI, J.

We concur:

s/HOLLENHORST, Acting P.J.
s/GAUT, J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

FILED - West District
San Bernardino County Clerk

In re the Marriage of	RFL06429
DEBRA K. KNIESLEY, Petitioner, v. WEBSTER WATNIK,	STATEMENT OF DECISION AND ORDER APR 2, 2001

Petitioner, Debra K. Watnik Kniesley's Order to Show Cause for Modification of Custody and Visitation came on regularly for hearing on January 16 and continuing on January 17, 18, 22, 23, 24, 25, 29, 30, 31, February 5, 6 and 7, 2001 in Department R-12 of the above-entitled court, the Honorable Ben T. Kayashima, Judge Presiding. Petitioner Debra K. Watnik Kniesley was in court and represented by P. Timothy Pittullo, Esq. Respondent, Webster Watnik, was in court in pro per. Wyeth Watnik appeared in court on February 6, 2001 and was represented throughout the proceedings by minor's counsel, Michael Darlington, Esq.

After consideration of the evidence, both oral and documentary, the arguments of counsel and the matter having been submitted to the Court for decision, the Court makes the following findings and orders.[1]

FINDINGS

1. A petition for dissolution of marriage was filed by

the Petitioner/Mother, Debra Watnik Kniesley on February 15, 1991; the date of separation was May 1, 1990 and there was one child of said marriage, Wyeth Philip Kniesley Watnik, whose birth date is July 27, 1989. He was at that time, 19 months old. The petition was filed in Los Angeles County, Pomona Branch.

2. A judgment of dissolution was filed on July 17, 1992 when the parties were awarded joint legal custody of the minor child with the primary physical custody awarded to the Petitioner/Mother and the Respondent/Father having specific periods of visitation. Said custody and visitation was pursuant to stipulation of the parties.

3. On August 24, 1994 this matter was transferred from the County of Los Angeles to San Bernardino County, more specifically the Rancho Cucamonga Branch.

4. That on April 20, 1994 Petitioner/Mother filed an Order to Show Cause seeking a change in custody status and other related issues. The matter was heard on September 6, 1994. Judge Dennis G. Cole made a ruling on September 7, 1994 which in essence maintained the status quo of the parties pending a trial on the matter. Dr. Les Herold was appointed to conduct an Evidence Code §730 evaluation of the parties.

5. On March 6, 1996, the matter came on for trial before Judge Raymond P. Van Stockum. A Statement of Decision was rendered by Judge Van Stockum on May 7, 1996. Sole legal custody was awarded to Petitioner/Mother along with the primary physical custody. The Respondent/Father was awarded specific visitation with minor. The order after the hearing of March 6, 1996 was filed on September 23, 1996.

6. Since the ruling on September 23, 1996, a series of Orders to Show Cause were filed by both parties. Consequently, each party filed an Order to Show Cause seeking a change in visiting arrangements. On or about this time period, a minor's counsel was

appointed, to wit: Ms. Elizabeth Courtney. Judge Van Stockum ruled upon these various Orders to Show Cause on March 4, 1997, with some changes being made on the visitation arrangements. The Order after said hearing was filed stamped April 14, 1997.

7. On September 1, 1998 before the Honorable J. Michael Gunn, there is a minute entry wherein "The Court finds parental counseling is in the best interest of the child and orders Respondent to complete a 52 week parenting/anger class. Minor's counsel shall monitor classes and report to the Court re: successful completion. The Court informs counsel it may order a 730 Evaluation upon successful completion of 52-week class."

8. There is a file stamp of January 19, 1999 on a court document entitled Statement of Decision. Apparently this matter was a post judgment Order to Show Cause re: Modification brought by the Respondent/Father. Three Orders to Show Cause having been filed on January 27, 1998, February 23, 1998 and May 28, 1998.

9. On April 13, 1999, a ruling of the Court re: Child Custody and Visitation, et seq. was filed by Judge Gunn. These findings were pursuant to a trial heard on February 16, 1999 and February 17, 1999. The order after said hearing of February 16 & 17, 1999 was filed stamped May 5, 1999. This OSC re: Modification was initiated by minor's counsel, Ms. Courtney, and filed February 11, 1999.

10. An Order After Hearing file stamped July 9, 1999 and signed by the Honorable Joseph Johnston enjoined the Respondent/Father from "contacting, molesting, harassing, attacking, striking, threatening, sexually assaulting, battering, telephoning, sending any messages to, following, stalking, destroying the personal property of, disturbing the peace of, keeping under the surveillance, or blocking movements in public places or thoroughfares of the Petitioner, Debra Watnik (Kneisley) and the minor child, Wyeth Watnik."

11. On August 12, 1999, the Honorable Frederick Mandabach made a temporary order, to wit: "Court orders no visitation or contact by Respondent until the next hearing date. Court will need medical evaluation from expert of counsels' choosing. (1. Dr. Robert Suiter, or Marguerite Mitchell or Jeanne Smith) in that order." The Court ordered the evaluation of the Respondent to determine whether he constituted a danger to the minor child. This was pursuant to an OSC filed by the Petitioner/Mother on August 9, 1999.

12. On November 17, 2000 the Honorable Thomas R. Murphy relieved minor's counsel, Elizabeth Courtney. Mr. Michael Darlington, Esq. was appointed as counsel for said minor child.[2]

13. Minute order of December 15, 2000 before the Honorable Thomas R. Murphy indicates that opening statements were made by both Petitioner/Mother and Respondent/Father. An in camera hearing was held with the minor child, with the minor's counsel, Michael Darlington present. On the same date in the afternoon the Honorable Thomas R. Murphy declared a mistrial and relieved Attorney Michael Darlington as counsel for the minor.

14. An in camera hearing was held with the minor child with minor child's counsel, Michael Darlington before this Court on January 16, 2001.[3]

15. Another in camera hearing was held with the minor child, with the minor child's attorney, Michael Darlington, being present on January 24, 2001. The minor child was put under oath. That on January 26, 2001, this Court released all three in camera transcripts to all parties.

16. There is total of nine (9) volumes of files. The minor child is now over 11½ years old.

17. The minor child, Wyeth Watnik, lived solely with the Petitioner/Mother without visitation or contact by the Respondent/Father pursuant to a temporary court order rendered by Judge Mandabach on August 12, 1999. That situation still exists today.

18. Petitioner contends that there was a court order rendered by Judge Van Stockum requiring the Respondent/Father to take minor son, Wyeth, to all of the sports activities. More specifically, that Respondent/Father failed to take Wyeth to play at his regularly scheduled baseball games in the summer of 1997. That the Respondent/Father had been given a copy of the schedule of said baseball games and that Respondent/Father was aware of said schedule. That he failed to take Wyeth to the baseball games and to allow him to participate.

Judge Van Stockum's order of September 23, 1996, states among other things: "Respondent is further ordered not to interfere in the child's schooling or sports activities. When such activities occur during his period of visitation, the Respondent is to honor the commitment and ensure the presence of the child at the event."...If the Respondent is present at any of the child's sports or other activities, he is to refrain from input directly to the child and to allow the child the freedom to play the game..."

Respondent/Father interpreted this order to mean that his only obligation was to make sure that he took Wyeth to the site of the baseball games. This he did. However, Wyeth did not play in any of the games on the weekends that Respondent/Father had visitation with his son. Respondent/Father testified that Wyeth did not want to play in any of the games. Respondent/Father further testified that he encouraged Wyeth to play.

Wyeth testified he wanted to play in the games but that his father (Respondent) thought he was too tired and that he should stay in bed.

This Court finds that Respondent/Father took Wyeth to the baseball games but did not allow Wyeth to play in the games.

This Court further finds that the baseball team had a picture day in which all team members gathered for picture taking. Respondent/Father was advised of the

date for the picture taking not only by the Petitioner/ Mother but also by his son Wyeth. The Court finds that Respondent/Father failed to deliver Wyeth to the picture-taking event.

19. Petitioner/Mother contends that Respondent/ Father cut Wyeth's hair during his weekend visitation, on or about January of 1998, without her consent or permission. Petitioner/Mother contends that he cut Wyeth's hair while he was sleeping.

Judge Van Stockum's order of September 23, 1996 states: "The award of sole legal custody specifically includes the right to cut the child's hair. The Respondent (Father) is specifically ordered not to cut the hair of the minor child. Petitioner shall be responsible for all hair cutting and styling of the minor child's hair."

Respondent/Father states that he never cut Wyeth's hair when he was not allowed to do so. He did cut Wyeth's hair when he was allowed to do so. Indeed, Wyeth cut his own hair and did a lousy job.

The minor son Wyeth testified that his Dad did cut his hair - "once, he messed up and had to take me to a barber."

This Court finds that Respondent/Father did cut Wyeth's hair on at least two occasions without the consent of Wyeth and/or the consent of Petitioner/ Mother contrary to the Court's order of September 23, 1996.[4]

20. Petitioner/Mother contends that Respondent/ Father did make contact with Wyeth at his school on April 23, 1999 and on numerous occasions during the month of May 1999. On May 19, 1999 at the school site while the Petitioner/Mother was picking up the child, Wyeth, the Respondent/Father came up to her car, and made inappropriate remarks in the presence of Wyeth. And, in the presence of children and Wyeth, the Respondent/Father "flipped me off."

On April 13, 1999, Judge Gunn in his "Discussion and Findings of Fact" states, among other things, "In

fact, the court has suspended Respondent's visitation pending this order. We are approximately two months past the hearing..." The Minute Order of February 17, 1999 states "Respondent may have telephone contact with the minor daily between 5:00 p.m. and 6:00 p.m. The minor shall return the phone call if he is not home." Judge Gunn further ordered that aside from reduced visitation, "Respondent shall have no visitation except by telephone as is currently ordered by this Court."

Respondent/Father testified that he interpreted Judge Gunn's ruling as no visitation with Wyeth but contact with Wyeth was not prohibited, i.e. at Wyeth's school. Respondent/Father has testified to the effect that "If I can find wiggle room, I'll take it."

This Court finds that Respondent/Father violated Judge Gunn's order on many occasions. The only contact permitted with Wyeth was by phone. This Court further finds that on May 19, 1999 in Wyeth's presence at his school, Respondent/Father while making inappropriate remarks to Petitioner/Mother "flipped her off."

21. Pursuant to Judge Gunn's order of April 13, 1999, Respondent/Father was scheduled for his first weekend with his son Wyeth on May 7, 1999, a Friday, at 6:00 p.m. to Sunday at 7:30 p.m.

Petitioner/Mother contends that when the Respondent/Father came after his son Wyeth, he parked his car in Petitioner/Mother's driveway close to the garage. That her father, Mr. Kniesley, escorted Wyeth out to the Respondent/Father's car. Respondent/Father for no apparent reason confronted Mr. Kniesley and yelled "Fucking old man. You're not taking Wyeth away from me..." while raising his fist at Mr. Kniesley.

Respondent/Father denied that he initiated any confrontation with Mr. Kneisley or that he made such statements to him. Respondent/Father contends that Mr. Kneisley initiated the confrontation by saying,

"Don't do it again" alluding to the alleged kidnapping in February of 1999. Respondent/Father admits it was a hostile exchange.

Wyeth stated that he did not remember the incident that well but he recalls his Dad yelling at his Grandfather.

This Court finds that a confrontation did take place, that it was initiated by Respondent/Father for no apparent reason and that Respondent/Father did use the language attributed to him by Petitioner/ Mother.

22. Petitioner/Mother contends that when Wyeth went with Respondent/Father for his visitation on June 4, 1999, Petitioner/Mother sent prescription medicine and eardrops with Wyeth. Petitioner/Mother further contends that Respondent/Father did not administer the medicine nor return the medicine to the Petitioner/Mother on June 6, 1999.

Respondent/Father testified that had he got it (the medicine) he would have returned it. That he did not intentionally fail to administer the medicine to his son. Wyeth does not recall this incident.

The Court finds that Respondent was aware that his son brought the prescription medicine and eardrops on said visitation but that he intentionally failed to administer the medicine to his son and intentionally failed to return the medicine at the end of the visitation.

23. By this time period the Petitioner/Mother and Respondent/Father had a complete breakdown in communications.

24. The Minute Order of February 17, 1999 by Judge Gunn states "Respondent may have telephone contact with minor daily between 5:00 p.m. and 6:00 p.m. The minor shall return the phone calls if he is not home."

Petitioner/Mother has submitted tape recordings of phone calls made by the Respondent to her residence pursuant to Judge Gunn's order. The tape recordings

have been received into evidence. This Court has listened to the tape recordings.

Respondent/Father testified that from February 9, 1999 to May 1999 he was cut off from contacting his son via telephone calls except for two occasions when he was able to talk to his son, Wyeth. Respondent/Father contends that Petitioner/Mother would not allow their son to call him back. By reason therefore, Respondent/Father could not do anything else but to leave messages.

In essence, Wyeth has testified that he did not want to talk to Respondent/Father.

This Court has reviewed the contents of said telephone messages and finds that there are approximately 52 telephone messages on various dates and not all of those calls are made between 5:00 p.m. and 6:00 p.m. as per court order. The general contents of said messages are very denigrating of the Petitioner/Mother such as accusing the Mother of violating the court order and refusing to allow his son to talk to him. Suggesting to Wyeth that he should escape his prison and that he would..."try to help you escape..."

The Court finds that the Petitioner/Mother did not willfully refuse to allow her son Wyeth to have telephone contact with the Respondent/Father. That Wyeth did not return the phone calls to his Father because he did not want to.

25. Petitioner further requested Respondent be required to pay his portion of orthodontia care for the minor child in the sum of $460. There was no evidence presented on this issue by Petitioner and therefore this request is denied.[5]

26. Petitioner/Mother contends that Respondent/Father had Wyeth sign his name to blank pieces of paper. That Respondent/Father then typed messages above Wyeth's signature. That the Respondent/Father was the author of the typed messages.

Respondent/Father testified that indeed he did have Wyeth sign his name on 4 to 5 blank pieces of

paper. However, Respondent/Father contends he typed what Wyeth told him. That Wyeth was the sole author of said messages.

Wyeth testified that he signed his name on blank pieces of paper; that he did not know the purpose of why his Father required him to sign his name on blank pieces of paper. Wyeth further testified that he did not know the contents of the typed written portions until he was shown an example by this Court.

Petitioner/Mother further contends that Respondent/Father required his son Wyeth to tape record pre-scripted statements.

Respondent/Father has testified that he tape-recorded his son, Wyeth, on May 9, 1999[6] but Wyeth's words were not pursuant to a script prepared by him. Said discussion on the tape was a free flowing and an extemporaneous type of conversation.

Wyeth has testified in open court during his cross-examination of him by Respondent/Father as to both the blank pieces of paper and the alleged pre-scripted statements on the tape.

Wyeth testified that as to the tape recording that, aside from the discussion about the dinner in the beginning of the tape, the balance of the tape was pursuant to a script where Respondent/Father would ask questions and Wyeth would respond by reading the answers on a piece of paper (script) prepared by Respondent/Father. This Court finds that Wyeth was made to sign his name to blank pieces of paper and that Respondent/Father, outside the presence of his son, authored the typed written message.

The Court further finds that Respondent/Father required his son Wyeth to make the tape recording. That the discussion, aside from the topic of dinner, was pursuant to a script prepared by Respondent/Father. A partial certified transcript of the cross-examination by Respondent/Father of his minor son Wyeth, that took place on February 6, 2001 is attached hereto marked Exhibit A.

27. Petitioner/Mother contends that Respondent/ Father disseminated to her entire neighborhood and to attorneys throughout Southern California letters and fliers, the contents of which were based upon the contents of the typed messages signed by Wyeth in blank and the pre-scripted tape recordings that Wyeth was required to make for the Respondent/Father. Petitioner/Mother further contends that her son Wyeth was exposed to the many inquiries made by her neighbors and also of the Police Department. This Court finds that the contentions of the Petitioner/ Mother are true.

28. Judge Gunn conducted a hearing on February 16, 1999 and February 17, 1999 wherein the moving party was minor's counsel, Ms. Elizabeth Courtney, Esq. The sole issue was an allegation that Wyeth was removed from Petitioner/Mother's home sometime during the night of February 9, 1999. This is the alleged "kidnapping" issue which was the subject of extended testimony once again before this Court. Respondent/Father's position to this Court is that Judge Gunn had ruled upon that issue when he rendered findings on April 13, 1999 and thus this issue is barred by the doctrine of res judicata.

This Court has studied Judge Gunn's findings. This Court concludes that although findings were made that Respondent/Father's credibility was impeached by his own sworn judicial admission that he, Respondent/Father, "had lied to the Court...about the events of that evening." Judge Gunn did not make a specific finding about the alleged kidnapping. Judge Gunn stated in his findings as follows: "This court cannot say either form of evidence is superior to the other in that one version is an extra judicial statement from an unsworn minor who attempted to deceive his mother into going to bed (earlier that she might have) in order to facilitate his own removal to Respondent's residence; the other version is from Respondent who by his own admission possesses credibility problems

with respect to the same transaction. The court finds neither form of evidence to preponderate over the other in this case;" It is to be noted that Judge Gunn did not rule upon whether the Respondent/Father was actually in the Petitioner/Mother's home (by his son's bedside) and led him out of the house to his own car and then transported him to his home and thus this Court finds that this issue is not res judicata.[7]

That regardless of whether this Court is correct on the res judicata issue, this Court finds that subsequent to the findings and order of Judge Gunn on April 13, 1999 and May 5, 1999, Respondent/ Father undertook a campaign to discredit both minor's counsel, Ms. Elizabeth Courtney and Petitioner/ Mother by intentionally involving the minor child, Wyeth. Further, Respondent/Father has reintroduced these issues when he filed an OSC re: Stay Away Orders on July 9, 1999 and which declaration was supplemented on August 3, 1999, seeking immediate custody of his ten-year-old son.

The primary topic was whether Respondent/Father "kidnapped" his son from Petitioner/Mother's home or did his son run away to "escape his prison" as alluded to by Respondent/Father.

Respondent/Father has testified in this Court that he picked up his son that evening walking on the road outside of Petitioner/Mother' home. That he was not in the house that evening.

Wyeth has testified that when he awoke, his Father was by his bedside in his bedroom and that he was then helped by his Father to dress and then to his car and ultimately to be driven to his Father's residence.

During that evening, the police were called. The son Wyeth was allowed to remain with the Respondent/ Father. Circumstantially this Court finds that Wyeth did tell the police that he did in fact run away, although Wyeth has testified that he cannot remember any police being called or that he talked to any policeperson. It is to be noted also that Wyeth could

not recall what he told the caseworker for the Child Protective Services on two separate interviews conducted about this alleged incident. Respondent testified that he initiated the contact with the Child Protective Services that resulted in the two interviews.

This Court finds that the Respondent/Father lied about his participation in regards to the alleged kidnapping. The Court finds that he was indeed in the Petitioner/Mother's home and more specifically in his bedroom and helped his son to his car and ultimately drove him to his own residence.

29. In the letters and fliers, the Respondent/Father also referred to the conduct of the Petitioner/Mother and Ms. Courtney. Respondent, in his letters, specifically refers to his son's accusations made on tape (May 9, 1999) and in writing about Ms. Courtney, (i.e. "that Courtney was illegally coercing him into making false statements. Courtney tried to pressure a helpless child into making false statements.")[8]

Wyeth has testified that the contents of the papers that he signed in blank and also in the taped recording about his Mother and Ms. Courtney did not and does not reflect his attitude toward either his Mother or Ms. Courtney nor did he agree that the conduct of his Mother and Ms. Courtney attributed to him was true. Wyeth stated that he always liked Ms. Courtney throughout the time she represented him.

This Court further finds that the contents of the letters, fliers and tape recordings are all false.[9]

Respondent/Father has testified that he had filed a civil suit against Ms. Courtney for the sole purposes of creating a conflict so that he would be able to get her off the case. The civil suit was dismissed by Respondent during the demurrer stage and after Ms. Courtney was relieved as minor's counsel by Judge Murphy.

30. The Petitioner/Mother is a woman of average intelligence who is now approximately 45 years of age. She is an educator and presently is employed in the

Pomona Unified School system.

She is a loving and responsible mother who, unfortunately, has been required to expend much of her time, energy and resources in recent years in the court system - due in large part to the conduct of Respondent/Father in regards to the minor son, Wyeth. For the most part of her testimony, she was credible.

Since August 12, 1999, Petitioner/Mother has asked her son Wyeth on several occasions as to whether he would want to see his father. That it would be an option for him (the son).

This Court finds that Petitioner/Mother is more likely to allow Wyeth more frequent and continuing contact with the non-custodial parent than Respondent/Father. That if Respondent's role were reversed with the Petitioner/Mother under the present court order, the Court finds that virtually all contact with the Petitioner/Mother and the minor child would cease and destroy the mother/son relationship that presently exists

31. The minor child, Wyeth, is a very intelligent child who is very engaging, very articulate and very credible. (On the 730 1994 evaluation by Dr. Herold, Ph.D. he tested within the top 1% of all children nationwide in intellectual aptitude). He has an amazing ability to recollect events-but refuses to recall events that he does not want to recall, i.e., talking to the police or even remembering the police after the February 9, 1999 kidnapping incident or talking to the Child Protective Service worker.

Wyeth has expressed a desire to see his father starting after this school year ends under a supervised setting at first, and if certain conditions[10] are met, then to expand the visitation with his father.

Wyeth would like these custody and visitation hearings to come to a stop.

32. The Respondent/Father is an intelligent and an articulate man, who is now 45 years of age (date of

birth February 1, 1956). It is the Court's understanding that he is a professional writer. He has authored several books, one of which is entitled "Child Custody Made Simple."

Respondent/Father has testified that he has attended a parenting class pursuant to Judge Gunn's order and he feels he is entitled to a joint legal and physical custody arrangement with his minor child with a time share of 50-50.

The Court finds that the Respondent/Father was not credible during his testimony in this trial. This Court further finds that the Respondent/Father has demonstrated extremely poor judgment, not only during the course of this trial, but also extremely poor judgment involving the minor child, Wyeth, in his elaborate scheme of laying a foundation of lies in his campaign against minor's counsel, Ms. Courtney, and the Petitioner/Mother, Ms. Kniesley. The campaign that was motivated not so much for his love for his child, Wyeth, but rather his attempt to be in total control of the Petitioner/Mother and of his child and to do so, to get rid of minor's counsel, Ms. Elizabeth Courtney, who he perceived to be his enemy.

It is clear to this Court that Respondent/Father did not care enough to consider the consequences of his actions on the emotional well being of the minor child. It is obvious that there is a reason why Wyeth cannot or refuses to recollect certain events. This Court finds that it is the product of emotional abuse inflicted upon Wyeth by the Respondent/Father, and it is but one example of such abuse.

This is a man without a sense of decency or morality. No amount of classes for parenting and anger management or therapy sessions with a licensed psychologist that may be ordered by this Court would be of any value.[11] This Court finds that the Respondent will continue to present a danger to the emotional well being of the minor child.

The character of the Respondent is such that he is

not to be entrusted in any fashion with the upbringing of the minor child, now or ever. The Court finds that the Petitioner/Mother has met her burden of proof. That the proven allegations contained in her Orders to Show Cause filed subsequent to Judge Gunn's order constitutes a substantial change of circumstances, such as to justify a change in visitation.

33. The Court finds that it is in the best interest of the minor child, Wyeth, that the sole legal and physical custody remain with the Petitioner. That but for the wishes of the child, this Court would deny all visitation and contact between the Respondent and the minor child. The visitation that is ordered herein below is extremely limited. The visitation shall be monitored. The monitor shall be a qualified licensed psychologist so that if emotional abuse is once again attempted by the Respondent/Father upon the minor son, Wyeth, it can be more readily recognized. That in the event the psychologist determines that the Respondent has attempted to emotionally abuse the child, it shall be reported promptly to minor's counsel. The visitation shall consist of one hour each month commencing the month of August 2001. Respondent/Father shall pay for the psychologist's fees and arrange to do so one month prior to the first visitation and one month prior to any and all subsequent visitations. If Respondent/ Father does not do so, the visitation for that time period will be forfeited. This Court finds that Respondent/Father does have the financial ability to pay for the psychologist's fees. The word contact is defined by this Court as any form of communication, directly or indirectly. The Court emphasizes that the visitation is not for the purposes of counseling or reunification between the Respondent and the child.[12]

34. This Court, at the outset of this hearing, instructed each party litigant to present a list of all outstanding motions and responsive declarations seeking affirmative relief that have not yet been ruled upon, or otherwise be precluded from bringing up

such issues again. Respondent has submitted his list consisting of 19 entries leading from March 27, 1998 through November 14, 2000. Such list is file stamped January 22, 2001. This Court has read and considered each separate entry. This Court finds that either the Respondent's request had been dealt with by this Court's present findings and order or there has been no evidence presented or argued by Respondent, i.e., entry of February 8, 2000 "Sanctions against Pittullo for abusive conduct during deposition". Accordingly, this Court denies all requests of Respondent including attorney fees and/or sanctions.

35. This Court finds that the three Orders To Show Cause filed by Petitioner/Mother has been necessitated by the conduct of the Respondent/Father. That Petitioner/Mother shall be entitled to reasonable attorney fees and costs. The sanctions requested by the Petitioner under CCP § 128.5, § 128.6 and Family Code §271 are denied.

36. The OSC filed by Respondent/Father on July 9, 1999 and supplemented on August 3, 1999 requesting a change of custody, attorney fees and sanctions are denied in its entirely.

37. Attorney Fees: Judge Gunn's order of April 13, 1999 states as follows: "As to the issue of attorney fees, the reason for this particular OSC was solely the conduct and responsibility of Respondent, and he shall pay the reasonable attorney fees of both Petitioner's counsel and counsel for the minor child. Counsel for Petitioner has not yet submitted a Declaration Re: Attorney fees, and no finding is made regarding the reasonableness of said fees, without prejudice to counsel for Petitioner submitting a declaration in the future."

Judge Gunn did not make a finding as to Respondent's ability to pay a reasonable fee for Petitioner's counsel, nor did Petitioner's counsel submit a request for fees until February 13, 2001.

Petitioner/Mother and Respondent/Father have

submitted their respective income and expense declarations listing assets and liabilities under penalty of perjury. The last financial document was received by this Court on March 27, 2001.

This Court finds that based on Respondent/ Father's declaration, he does not have the present ability to pay the Petitioner's attorney fees as requested. That should evidence contrary to Respondent/Father's declaration be submitted to the satisfaction of a court in the future, or if Respondent/ Father obtains gainful employment and earns a sufficient salary, the finding may be otherwise. Accordingly, the Court reserves jurisdiction on this issue. This Court further reserves jurisdiction over the issue of allocation of fees to minor's counsel.

ORDERS

1. Petitioner/Mother shall retain the sole legal and physical custody of Wyeth, born July 27, 1989.

2. Respondent/Father shall have monitored visitation with Wyeth for a period of one hour per month commencing August, 2001. Visitation shall be held at the office of Charles R. Shipley, Ph.D., located at 372 West 16th Street, San Bernardino, California; phone number 909-886-4868. Aside from this visitation, there shall be no contact between Respondent/Father and the minor child Wyeth and no contact between Respondent/Father and Petitioner/ Mother. Respondent/Father shall pay for the psychologist's fees and arrange to do so one month prior to the first visitation and one month prior to any and all subsequent visitation. If Respondent/Father does not do so, the visitation for that time period will be forfeited.

3. The minor's counsel will continue to be Mr. Michael Darlington, Esq. His telephone numbers are 530/221-2700 and 530/527-2336. Any and all information requested by the Respondent in regards to

the minor child Wyeth shall be directed to the minor's counsel. Minor's counsel is directed to arrange and coordinate the monthly visitation among the psychologist, the minor child Wyeth, and Respondent/ Father.

4. The Court shall reserve jurisdiction as to whether the Respondent shall pay to the Petitioner's counsel reasonable attorney's fees and costs.

5. The Court shall reserve jurisdiction as to whether this Court will allocate attorney fees and costs of minor's counsel. At the present time and for the immediate future, the Court directs the County to pay for minor counsel's fees as it is submitted.

6. Existing child support orders shall continue. If any party wishes to modify, they must do so by noticed motion and shall be heard by a short cause family court judicial officer.

DATED: April 2, 2001

s/BEN T. KAYASHIMA
Judge of the Superior Court

[1] The Court studied and considered tile entire file including the following: transcripts of hearings before Judges Van Stockum, Gunn, Mandabach and Murphy, two (2) 730 evaluations of the parties and the minor child one filed on 3/5/96 and one dated 10/8/94 but not filed. Further, this Court held two (2) in camera hearings with the minor child, Wyeth, and his counsel, Mr. Darlington on 1/16/01 & 1/24/01. At the last in camera hearing, the minor child was sworn under oath. See in re Marriage of Schaffer (1999) 69 CA4 801.

[2] Judge Murphy, a visiting judge well versed in family taw, was assigned this file with a one or two day's trial estimate by yet another judge.

[3] This Court was assigned this matter on December 18. 2000, and the hearing commenced on January 16, 2001.

[4] Findings [8 and 19 are pursuant to Petitioner's OSC filed t/30/98. Petitioner was seeking a further reduction of Respondent's visitation with the minor child. Judge Gunn did not address this OSC at his hearing of 2/16 & 2/17/99 nor did any other judges adjudicate the issues presented.

[5] Findings 20, 2 l, 22, 24 and 25 are pursuant to Petitioner's OSC filed 6/17/99. Petitioner was seeking suspension of Respondent's visitation rights, including summers and reimbursement for orthodontia costs.

[6] Respondent testified that there was another tape recording made by his son. The tape was not presented by Respondent.

[7] See Dunkin vs. Boskey (2000) 82 CA4 171, 180-181 & cases cited therein; Judge Gunn did not conduct an in camera hearing with the minor child, nor did the child testify in court.

[8] See supplementary declaration of Respondent/Father filed on August 3 1999 with exhibits attached thereto.

[9] Findings 26, 27, 28 and 29 are pursuant to Petitioner's OSC filed 8/9/99. Petitioner was seeking to suspend visitation rights of Respondent.

[10] Some of the conditions were (1) stop yelling at him (anger), (2) making him stay in bed when he is not tired, (3) no more signing anything in blank or making prescripted tape recordings.

[11] Respondent has testified that in 1999 he attended two separate parenting classes lasting 6 weeks for each class. Also, he testified that he attended approximately 4-6 counseling sessions with a Dr. John Kinsman, a psychologist.

[12] This Court has read and considered many cases and the Family Codes. In particular, see the following: In re Marriage of Carney (1979) 24 C3 725,730-73 l; Buchard v. Garav, (1986) 42 C3 531, 536; In re Marriage of Burgess (1996) 13 C4 25, 37; In re Marriage of Biallas (1998) 65 CA 4, 755; Lester v. Lennane (2000) 84 CA4 536; Family Code §§ 301 l; 3020: 3040; 3042(a)(b).

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re the Marriage of Debra and Webster Watnik.	S110828
Debra Kniesley, Respondent, v. Wwbster Watnik, Appellant.	FILED November 26, 2002

Court of Appeal, Fourth Appellate District, Division Two—No. E029628

Petition for review DENIED.

s/GEORGE
Chief Justice